TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 98.

THE POSTAL TELEGRAPH-CABLE COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOROUGH OF TAYLOR.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

FILED JULY 20, 1908.

(13,000)

(18,615.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 1, 1903.

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1 *Petition for Allowance of Writ of Error.*

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF TAYLOR
against
POSTAL TELEGRAPH CABLE COMPANY, Appellant. } No. 191.

To the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania:

The petition of the Postal Telegraph Cable Company, respectfully showeth:—

That a suit against it was brought into the supreme court of Pennsylvania, for the eastern district, of January term, No. 191, by writ of certiorari from the judgment of the superior court of Pennsylvania, of January term, No. 24, affirming the judgment of the court of common pleas Lackawanna county, of March term, 1900, No. 447, in which suit in said supreme court and said superior court your petitioner was appellant, and defendant in the said court of common pleas; and The Borough of Taylor was appellee in said supreme court and said superior court, and plaintiff in said court of
2 common pleas. That the said suit in the said court of common pleas was an action of assumpsit, brought to recover what it called licensed fees and charges for the years, beginning January 31st, 1898, and January 31st, 1899, amounting to one dollar ($1.00), per year for each telegraph pole, and two dollars and fifty cents ($2.50) per mile of wire upon said poles of your petitioner, maintained and used by it in the said borough of Taylor.

Your petitioner, in answer to said suit, claimed that it was not liable as charged, because it was a corporation of the State of New York, and had paid all taxes due by it to the Commonwealth of Pennsylvania upon the value of its poles and wires erected and maintained in said borough and elsewhere in said State; that it had accepted the act of Congress, approved July 24th, 1866, and the amendments and supplements thereto; that the poles and wires in question were principally employed and operated in the transmission of messages between the different States, and are therefore instruments of commerce among the several States; that the poles and wires were constructed and have been at all times used for the transmission of telegraphic messages of the United States Government; that the highways upon which said poles and wires are constructed and operated are post roads and post routes; that the said poles and wires are part of the interstate telegraph system of the
3 petitioner, run into and through nearly every State of the United States and connect with submarine cables of Europe and other foreign countries; that your petitioner never has maintained any office in said borough, and the said telegraph line, consisting of said poles and wires, merely runs through it, and no

telegraph business of any kind is done or transacted by it in said borough, except the maintenance of the said line and the transmission of telegraphic messages over the same.

That the said court of common pleas of Lackawanna county rendered judgment against your petitioner, on April 25th, 1900, in the sum of two hundred and twenty dollars and fifty cents ($220.50). That on February 14th, 1901, the superior court of Pennsylvania, sitting at Philadelphia, ordered said judgment to be affirmed, and afterwards, on the fourteenth of February, 1901, the said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid. That on May 19th, 1902, the supreme court of Pennsylvania, sitting at Philadelphia, ordered said judgment of the superior court to be affirmed, and afterwards, on the 19th day of May, 1902, said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid. That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania; that the judgment of the said court is final.

4 That the right, title, privilege and immunity claimed by your petitioner, defendant and appellant aforesaid, was claimed under the Constitution of the United States, article 1, sec. 8, clause 3, providing, amongst other things, that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. Also, under the constitution of the State of Pennsylvania, article 16, sec. 12, providing that corporations organized for the purpose shall have the right to construct lines of telegraph within the State of Pennsylvania, and directing the General Assembly to provide reasonable regulations to give full effect to said section. Also, that pursuant to this mandate the legislature of Pennsylvania, by the act of April 29th, 1874, sec. 33, P. L. 92, provided that telegraph companies should have the right to construct lines of telegraph along and upon any of the public roads, streets, lanes or highways of the State.

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against the right, title, privilege and immunity so claimed as aforesaid. Your petitioner therefore prays for the allowance of a writ of error to the Supreme Court of the United States, in order that the said judgment of the supreme court of Pennsylvania may be re-examined and reversed or affirmed in the United States Supreme Court;

And it will ever pray.

5 POSTAL TELEGRAPH CABLE COMPANY,
By W. H. BAKER, *Vice Pres't.*

STATE OF NEW YORK, }
County of New York, } *ss:*

Wm. H. Baker, being duly sworn according to law, deposes and says that he is the vice-president of The Postal Telegraph Cable Company, the petitioner above named, and on behalf of the said com-

pany says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

W. H. BAKER.

Sworn and subscribed before me this 26th day of May, 1902.
[SEAL.] THEODORE L. CUYLER, JR.,
Notary Public Notary Public, *Kings County.*

Certificate filed in N. Y. Co.

STATE OF NEW YORK, } ss:
County of New York, }

I, Thomas L. Hamilton, clerk of the county of New York, and also clerk of the supreme court for the said county, the same being a court of record, do hereby certify, that Theodore L. Cuyler,
6 Jr. has filed in the clerk's office of the county of New York, a certified copy of his appointment and qualification as notary public for the county of Kings with his autograph signature and was at the time of taking the annexed deposition, duly authorized to take the same, and that I am well acquainted with the handwriting of said notary public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 26 day of May, 1902.
[SEAL.] THOS. L. HAMILTON, *Clerk.*

Endorsement: Supreme court of Pennsylvania, eastern district. Borough of Taylor *v.* Postal Tel. Cable Co. Appeal of the Postal Telegraph Cable Company from the judgment and decree entered in the case in which The Borough of Taylor was pl'ff and the above named appellant, defendant.

And now, to wit, June 6th 1902, citation awarded and writ of error allowed by me.

J. BREWSTER McCOLLUM,
Chief Justice of Penna.

7 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the supreme court of the State of Pennsylvania for the eastern district, Greeting:

Because, in the records and proceedings as also in the rendition of the judgment of a plea, which is in the said supreme court of Pennsylvania, for the eastern district, before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had, which plea was the appeal of the Postal Telegraph Cable Company, of January term, 1901, No. 191, to the Supreme

Court, by writ of certiorari, from the judgment of the superior court of Pennsylvania, of January term, 1901, No. 24, affirming the judgment of the court of common pleas of Lackawanna county, of March term, 1900, No. 447, in a certain suit between The Borough of Taylor, plaintiff, against The Postal Telegraph-Cable Company, defendant, wherein was drawn in question the validity of the Constitution and statute law of the United States, and a defense claimed and exercised thereunder, and the decision was against their validity, a manifest error hath happened, to the great damage of the said Postal Telegraph-Cable Company, as by their complaint appears.

8 & 9 We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of June, in the year of our Lord one thousand nine hundred and two, and the one hundred and twenty-sixth year of the Independence of the United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

GEORGE BRODBECK, JR.,
Pro Clerk United States Circuit Court,
Eastern District of Penna.

10 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF TAYLOR
against
POSTAL TELEGRAPH-CABLE COMPANY, Appellant. } No 191.

Citation.

The United States of America to the Borough of Taylor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the eastern district, wherein The Postal Telegraph-Cable Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said

plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

11 Witness the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania, this 6th day of June, in the year of our Lord one thousand nine hundred and two (1902).

J. BREWSTER McCOLLUM,
Chief Justice of Penna.

Now July 5, 1902, service of the within citation is hereby accepted, and copy waived.

THE BOROUGH OF TAYLOR,
By JOHN M. HARRIS, *Solicitor.*

12 [Endorsed:] 191 Jan'y term 1901 Supreme court of Penna. eastern district Borough of Taylor *v.* Postal Telegraph-Cable Company, appellant Citation Frank R. Shattuck, attorney at law, Betz building, Philadelphia.

13 *Bond Sur Writ of Error to the Supreme Court of the United States.*

Know all men by these presents: That we, the Postal Telegraph-Cable Company, as principal, and the Union Surety & Guaranty Co. as surety, are held and firmly bound unto the Borough of Taylor in the full and just sum of six hundred dollars, to be paid to the said Borough of Taylor, its certain attorney, successors or assigns, to which payment well and truly to be made we do bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Seal- with our seals, and dated the 27th day of May, in the year of our Lord one thousand nine hundred and two (1902).

Whereas lately at a court of common pleas of Lackawanna county, a judgment was entered against the Postal Telegraph-Cable Company, at the suit of the Borough of Taylor, of March term, 1900, No. 447, which judgment was afterwards affirmed by the supreme court of the State of Pennsylvania in a certain plea and suit in said court, of January term, 1901, No. 191, and the said Postal Telegraph-Cable Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last above entitled action, and having filed a copy thereof in the office of the prothonotary of said court, and a citation directed to the said Borough of Taylor, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Wash-

14 ington the second Monday of October, next.

Now the condition of the above obligation is such, that if the said Postal Telegraph-Cable Company shall prosecute its said writ of error to effect and answer all damages and costs, if they shall

fail to make their plea good, then the above obligation to be void, else to be and remain in full force and virtue.

THE POSTAL TELEGRAPH-CABLE CO.,
By W. H. BAKER, *Vice-President.*

Attest:
[SEAL.] CHAS. P. BRUCH, *Ass't Secretary.*

THE UNION SURETY & GUARANTY CO.
HERMAN SCHUYLER,
Acting Vice-President.

Attest:
[SEAL.] JOHN H. MYERS, *Secretary.*

Approved by
J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

Endorsement: Supreme court of Penna. eastern district. Borough of Taylor *v.* Postal Tel.-Cable Co., appellant. Bond sur writ of error to the Supreme Court of the United States.

15 Supreme Court of Pennsylvania, Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania, in and for the eastern district, *inter alia*, the following is thus contained:

APPEARANCE DOCKET.

Docket Entries.

January Term, 1901. No. 191.

BOROUGH OF TAYLOR, Plaintiff,
v.
POSTAL TELEGRAPH CABLE COMPANY, Defendant. } 191.

Frank R. Shattuck.
Appeal of defendant C. P. 447 March term 1900 superior court 24 January term 1901 from the judgment.

Appeal from the *superior court* filed May 20, 1901.
Eo die.—Certiorari exit and directed to the court of *common pleas* of the county of *Lackawanna*, ret'ble forthwith.
16 April 22, 1901.—Petition for an allowance of an appeal from the superior court to the supreme court filed.
May 1, 1901.—Appeal allowed. *Per curiam.*
February 24, 1902.—Record returned and filed.
Eo die.—Assignments of error filed.
February 24, 1902.—Argued.

May 19, 1902.—Judgment affirmed. *Per curiam.*

June 6, 1902.—Petition for writ of error from the Supreme Court of the United States brought into office.

"And now June 6, 1902 citation awarded and writ of error allowed by me

J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

June 6, 1902.—Bond in sum of six hundred dollars brought into office and filed.

June 28, 1902.—Writ of error from the Supreme Court of the United States brought into office.

July 7, 1902.—Citation with acceptance of service brought into office.

Eo die.—Assignments of error *in re* writ of error brought into office.

17 *Appeal and Affidavit.*

In the Supreme Court of Pennsylvania for the Eastern District.

BOROUGH OF TAYLOR, Plaintiff, *v.* POSTAL TELEGRAPH CABLE COMPANY, Defendant. } No. 24. Superior Court of Pennsylvania, January Term, 1901.

Enter appeal on behalf of Postal Telegraph Cable Co. from the judgment of the superior court of Pennsylvania.

F. R. SHATTUCK,
Att'y for Appellant.

To Charles S. Greene, prothonotary supreme court, eastern district.

STATE OF NEW YORK, *County of New York,* } *ss:*

William H. Baker, vice president of the Postal Telegraph Cable Company being duly sworn saith that said appeal is not taken for the purpose of delay, but because appellant believes it has
18 suffered injustice by the judgment from which it appeals.

WILLIAM H. BAKER.

Sworn to and subscribed, this 14th day of May, A. D. 1901.

[SEAL.] THEODORE L. CUYLER, JR.,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

Endorsement: No. 191 January term, 1901. Supreme court of Pennsylvania, eastern district. Borough of Taylor *v.* Postal Telegraph Cable Company. Appeal and affidavit. Filed May 20, 1901. In supreme court. Frank R. Shattuck, attorney for appellant.

Præcipe for Certiorari.

In the Supreme Court of Pennsylvania for the Eastern District.

POSTAL TELEGRAPH CABLE COMPANY, Appellant. No. 447, March Term, 1900.

Certiorari to the court of common pleas of the county of Lackawanna.

Issue certiorari to the court of common pleas of the
19 county of Lackawanna to bring up record and proceedings in a certain action in said court, No. 447 March term 1900 and in the superior court of Penna. No. 24 January term 1901 wherein Borough of Taylor was plaintiff and the said appellant was defendant. Returnable to next term, *sec. reg.*

——— ———,
Attorney for Appellant.

To Charles S. Greene, prothonotary supreme court—eastern district.

Endorsement: No. 191 January term 1901. Supreme court of Pennsylvania, eastern district. Borough of Taylor *v.* Postal Telegraph Cable Company. Præcipe for certiorari. Filed May 20, 1901. In supreme court. Frank R. Shattuck, attorney for appellant.

Petition for Allowance of an Appeal from Superior Court to Supreme Court.

Supreme Court of Pennsylvania.

BOROUGH OF TAYLOR, Appellee,
v.
POSTAL TELEGRAPH CABLE CO., Appellant.

20 To the honorable the judges of said court:

The petition of the Postal Telegraph Cable Company respectfully represents.

That it is the defendant and appellant in a certain action now pending in the superior court of Pennsylvania, for the eastern district thereof, of January term 1901 No. 24, wherein The Borough of Taylor is the plaintiff. Said action was originally commenced by the said Borough of Taylor in and for the county of Lackawanna, in the State of Pennsylvania: The rule for judgment for want of a sufficient affidavit of defense was entered by the plaintiff and the said rule made absolute. An appeal was taken to the superior court of Pennsylvania, for the eastern district thereof, which said court, by an

opinion filed therein upon the fourteenth day of February, 1901, duly affirmed the said judgment.

The claim of the plaintiff, the said Borough of Taylor, against the defendant, is to recover license fees for two years, beginning January 31, 1898 and ending January 31, 1900, sought to be imposed upon the defendant by a certain ordinance of the borough of Taylor, approved January 10, 1894, by the terms of which every telephone, telegraph, electric and electric railway company, erecting or maintaining poles or wires within the borough limits, is required to pay an annual license fee of one dollar for each pole and
21 two dollars and a half for each mile of wire so erected or maintained.

The poles and wires situate in the borough of Taylor are a part of the interstate telegraph system of the defendant running into and through nearly every State of the United States, and connecting with submarine cables from the United States to Europe and other foreign countries, and the messages transmitted over such telegraph lines maintained by the said poles and wires are in part telegraphic messages between different States of the United States and between the United States and foreign countries, and said messages are one species of interstate and international commerce.

The defendant has never maintained any office whatsoever in the borough of Taylor, and its said telegraph line merely runs through it, and no telegraph business of any kind whatsoever is done or transacted therein, except the maintenance of said line and the transmission of telegraphic messages over the same. There was no cost, expense, damage or liability imposed upon the said borough, as it was positively set forth in the affidavit of defense, nor was there any supervision or regulation whatsoever by the said borough of said poles and wires. Under the facts as set forth in the affidavit of defense, the defendant contended that there was no power in the borough of Taylor to levy such a license fee or tax by ordinance or otherwise, or any authority for so doing, because the defend-
22 ant in the transaction of business carried on by means of said poles and wires, was engaged in the transaction of commerce among the several States and with foreign nations, and that the attempted imposition of license fees in question was in fact denying the defendant the equal protection of the laws and was a tax levied on the franchise granted by the United States of America and upon one of the instrumentalities employed by the Government thereon in the carrying on of the said Government, and was in fact the imposition of a tax upon interstate business and illegal and void as an unlawful interference with commerce among the several States. It was also set forth in said affidavit of defense that defendant was a corporation of the State of New York, and that it had accepted the act of Congress approved July 24, 1866, and the amendments and supplements thereto. It was also set forth in said affidavit of defense that the said poles and wires were constructed and have been at all times and are now used for the transmission of telegraphic messages of the United States Government and the various departments

thereof, at prices fixed from time to time by the Postmaster General of the United States, in accordance with the terms of the said act of Congress, approved July 24, 1866, and that the highways upon which the said poles and wires are constructed and operated are post roads and post routes within the meaning of said act of Congress and the amendments and supplements thereto, and the acts of
23 Congress defining post roads and post routes.

Upon the argument in the superior court, the point involved was the power of the borough of Taylor to impose said license fees, because the said ordinance was a regulation of commerce between the States, and amounted to taxation upon interstate commerce, and therefore void; and it is also not within the power of the borough of Taylor to impose these license fees by reason of the provisions of clause 3, section 8 of article 1 of the Constitution of the United States.

Your petitioner further avers that it denies in this case the right of the borough of Taylor to impose any license fees whatsoever upon its poles and wires, because the same are in fact a regulation of commerce between the States, and their imposition is not justified by any police power existing, or claimed to exist, in the said borough of Taylor, and that police power confers no authority or right to impose said fees, or any fees, upon said poles and wires.

Your petitioner avers that it is advised by counsel that this is a question involving the construction and application of the Constitution of the United States and the act of Congress of July 24, 1866, and therefore prays that an appeal may be allowed from the said judgment of the superior court, and that a certiorari be issued from this court, in accordance with law and the act of assembly in such case made and provided.

24 Annexed hereto is a copy of the opinion of the superior court affirming said judgment and filed herewith is a copy of the paper book of the appellant, the said appellee not presenting any paper book.

And it will ever pray, etc.

POSTAL TELEGRAPH CABLE COMPANY,
By WM. H. BAKER,
Vice President and General Manager.

STATE OF NEW YORK, } ss:
County of New York, }

William H. Baker being duly sworn according to law deposes and says that he is the vice president and general manager of The Postal Telegraph Cable Company, the defendant above named, and that the facts set forth in the foregoing petition, so far as stated upon his own knowledge, are true and so far as they are stated upon information derived from others, he verily believes them to be true.

WM. H. BAKER.

Sworn to and subscribed before me this 12th day of April, 1901.

THEODORE L. CUYLER, JR.,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in N. Y. Co.

25 *Statement of Grounds for Appeal.*

Upon the argument in the superior court in this case, the power of the borough of Taylor to impose the license fees in question, was contested, upon the ground that they amounted to taxation upon interstate commerce, and the ordinance for this reason was void.

The case therefore, directly involves the construction or application of the Constitution of the United States and the post roads act of Congress of July 24, 1866, and the appellant therefore believes it has the right to appeal to this court. It is believed by counsel that this case presents the question which it is desired to have determined, in a concise form and favorable for the defendant. The poles and wires for which license fees were imposed were a part of its interstate telegraph system connecting with submarine cables from the United States to Europe and other foreign countries; no business whatever was transacted in the borough of Taylor; the defendant had no office there, and it was set forth positively by defendant that the borough of Taylor had not made any payments or disbursements for inspection or for regulating the line of the defendant, and that there was no inspection or regulation by the said borough, nor was there any cost or expense imposed upon it by the maintenance and existence of these poles and wires.

26 This court has undoubtedly in a number of cases involving the same point, decided the same adversely to the present contention of the defendant. This case is, however, of great importance, because of the large aggregate of charges of similar kind imposed by the cities and boroughs of this State; the record in this case showing that at the same rate, the total amount exacted from this defendant company, in the State of Pennsylvania, would be a sum exceeding $100,000 per annum.

This defendant company desires to have the question as to the right of the boroughs to impose such taxes under the guise of the exercise of their police powers, determined if possible by the Supreme Court of the United States. Because of the decisions already rendered by this court, the defendant would not again present this question for determination were it not for the fact of its desire to present the matter to the United States Supreme Court upon an appeal from this court, if its decision is against the contention of the defendant, and thus have the question finally determined and settled.

In presenting this matter it is proper to state that it is the belief of the defendant that the appeal is of right and not of grace, and

counsel desire to state that the endeavor will be made to make the burden of the disposition of the case, as light as possible.

FRANK R. SHATTUCK,
Att'y for Appellant.

27 Endorsement: 191 January term 1901. Borough of Taylor, appellee *v.* Postal Telegraph Cable Company appellant. Petition of Postal Telegraph Cable Co. for allowance of an appeal from the superior court of Penna. to the supreme court of Penna. May 1, 1901 appeal allowed. *Per curiam.* Filed April 22, 1901. In supreme court.

28 *Assignments of Error.*

In the Supreme Court of Pennsylvania, Eastern District, January Term, 1901.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH-CABLE COMPANY. } No. 191.

Assignments of error.

First. The learned superior court erred in affirming the judgment of the court of common pleas of Lackawanna county, of March term 1900, No. 447.

Second. The learned superior court erred in not reversing the judgment of the court of common pleas of Lackawanna county, of March term 1900, No. 447.

F. R. SHATTUCK,
Att'y for Postal Telegraph Cable-Co., App't.

Endorsement: In the supreme court of Pennsylvania, eastern district. January term 1901. No. 191. Borough of Taylor *v.* Postal Cable Co. Assignments of error. Filed Feb. 24, 1902. In supreme court.

29 Endorsement: 447 Mar. term 1900. C. P. Lackawanna Co. Borough of Taylor *v.* The Postal Telegraph Cable Co. appellant. Appeal bond. Filed June 16, 1900.

Opinion.

Supreme Court, Eastern District.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH CABLE CO., App't. } No. 191, January Term, 1901.

Appeal and certiorari from the judgment of the superior court of Pennsylvania, of January term, 1901, No. 24, affirming the judgment of the court of common pleas of Lackawanna county.

Filed May 19, 1902.

Per Curiam:

The judgment in this case is affirmed on the opinion of Judge Rice of the superior court.

30 *Docket Entries.*

No. 24, January Term, 1901.

In the Superior Court of Pennsylvania, in and for the Scranton District.

BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE CO., Appellant. } Appeal from the Court of Common Pleas for the County of Lackawanna by the Defendant. No. 447, May Term, 1900.

J. M. Harris, Esq., attorney for Borough of Taylor.
F. R. Shattuck, Esq., attorney for appellant.

June 9th præcipe filed.
Eo die certiorari filed.
Returnable 2nd Monday of January 1900.
Appellant's assignments of error filed December 13, 1900.
Submitted January 15th, 1901.
Now, February 14th 1901 at Williamsport judgment affirmed *per curiam.*
31 Remittitur and copy of opinion sent Prothonotary Copeland February 21st 1901.
Exit case.
April 22nd 1901 petition of Postal Telegraph Cable Company for an allowance of an appeal from the superior court to the supreme court filed on motion of Frank R. Shattuck, attorney for petitioner.
May 1st, 1901 appeal allowed. *Per curiam.*
True copy from record.

[SEAL.] In testimony whereof, I have hereunto set my hand and the seal of said court, at Scranton this fourth day of June 1902.

SAM. H. STEVENS,
Prothonotary.

Appeal and Affidavit.

In the Superior Court of Pennsylvania, at Scranton.

In the Common Pleas Court, County of Lackawanna.

BOROUGH OF TAYLOR, Plaintiff,
v.
THE POSTAL TELEGRAPH CABLE CO., Defendant. } No. 447, March Term, 1900.

32 And now the Postal Telegraph Cable Co. appeals from the judgment of the court of common pleas of the county of Lackawanna in the above entitled cause to the superior court of Pennsylvania.

PHILADELPHIA COUNTY, *ss:*

Chas. C. Adams, sup't being duly sworn according to law, doth depose and say that the above appeal is not intended for delay, but because the appellants firmly believe they have suffered injustice by the judgment from which they appeal.

CHAS. C. ADAMS,
Superintendent.

Sworn and subscribed before me this 7th day of May A. D. 1900.

EDWARD EVERITT,
Notary Public.

Enter the above appeal in the superior court.
To Sam. H. Stevens, Esq., prothonotary of superior court, Scranton district.

F. R. SHATTUCK,
Att'y for Appellant.

Endorsement: No. 24 January term 1901. Superior court of Pennsylvania, sitting at Scranton. Borough of Taylor *v.* The Postal Telegraph Cable Co., appellant, Appeal and affidavit. Filed June 9, 1900. F. R. Shattuck, attorney for appellant.

33 *Præcipe for Certiorari.*

In the Superior Court of Pennsylvania, Sitting at Scranton.

Borough of Taylor *v.* The Postal Telegraph Cable Company, Appellant.	Certiorari to the Court of Common Pleas of the County of Lackawanna, of March Term, 1900. No. 447.

Issue certiorari to the court of common pleas of the county of Lackawanna to bring up record and proceedings in a certain action in said court, No. 447 March term 1900 wherein Borough of Taylor is plaintiff and The Postal Telegraph Cable Company is defendant.

Returnable to next term, *sec. reg.*

To prothonotary, superior court, sitting at Scranton.

F. R. SHATTUCK,
Attorney for Appellant.

Endorsement: No. 24 January term 1901. Superior court of Pennsylvania. Sitting at Scranton. Borough of Taylor *v.* The Postal Telegraph Cable Co., appellant. Præcipe for certiorari. F. R. Shattuck, attorney for appellant.

34 *Assignments of Error.*

In the Superior Court of Pennsylvania.

Borough of Taylor
v.
Postal Telegraph Cable Company.

Assignments of error.

First. The learned court below erred in making the rule for judgment for want of a sufficient affidavit of defense absolute.

Second. The learned court below erred in not discharging the rule for judgment for want of a sufficient affidavit of defense.

F. R. SHATTUCK,
Attorney for Defendant.

Endorsement: # 24 January term, 1901. Borough of Taylor appellee *v.* The Postal Telegraph Cable Co., appellant. Assignments of error. Filed Dec. 13, 1900.

35 *Opinion of the Superior Court of Pennsylvania.*

In the Superior Court of Pennsylvania.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH CABLE CO. } No. 24, January Term, 1901. Appeal from Judgment of C. P. of Lackawanna County.

Per Curiam:

The defendant was incorporated under the laws of the State of New York and by its acceptance of the restrictions and obligations required by the act of Congress of July 24, 1866, 17 Stat. at L. 308, sec. 201, has acquired the powers and privileges conferred on that act. It has also paid to the Commonwealth of Pennsylvania all taxes imposed by her laws. It has no office in the borough of Taylor, and its poles erected within, and its wires running through the borough are used principally for the transmission of messages between the several States of the Union. No messages are received or sent in the borough, but it is not alleged that the wires are not used for the transmission of messages between different points within the Commonwealth. If such were the fact, we may safely assume that it would have been alleged in the affidavit of defense. Being engaged in intrastate as well as interstate business, and its poles and wires within the borough limits being used for both purposes, we think it clear, both upon reason and authority, that
36 it is subject to police regulation with respect to the same. It is equally well settled that the imposition of a reasonable annual license fee for each pole and mile of suspended wire erected within the limits of the borough is a legitimate exercise of the police power designated to cities and boroughs: Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Phila. *v.* Am. Un. Tel. Co., 167 Pa. 406; North Braddock *v.* Central District & Printing Tel. Co., 11 Pa. Superior Ct. 24. It seems to us, therefore, that the only open question, if there be any, is as to the reasonableness of the fee.

Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge, are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. Hence an affidavit of defence which averred that the fee was "wholly disproportioned to the usual, ordinary or necessary expense of municipal officers of issuing licenses and other expenses thereby imposed upon the municipality" was held to be insufficient to prevent judgment in an action for the fee. The supreme court said: "For the purposes of this case we must treat this averment as true as far as it
37 goes. The difficulty is it does not go far enough. It refers only to the usual, ordinary or necessary expenses of municipal officers, of issuing licenses and other expenses thereby

imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake therefore to measure the reasonableness of the charge by the amount actually expended by the city for a particular year to the particular purposes specified in the affidavit:" Chester *v.* W. U. Tel. Co. 154 Pa. 464. It is clear, further, that the reasonableness of the fee is not a question for the jury, otherwise we would have one jury deciding upon the proofs adduced in a particular case that the fee was reasonable and another jury deciding upon the pooofs adduced in another case, that the same fee in the same municipality was unreasonable. Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the court, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly
38 exercise and the expense of the same. Such a decision becomes a precedent which is to be regarded in other cases similarly situated. Were it to be held otherwise, the law upon the subject would be in hopeless confusion and uncertainty. We make these remarks because we cannot escape the conclusion that some of the averments of the affidavit of defense are, in reality, but the opinion of the defendant, undoubtedly honestly entertained, as to these matters. They are not stronger than the averments in Philadelphia *v.* Am. Un. Tel. Co., 167 Pa. 406, and the other facts averred do not distinguish the case from others in which a similar fee in boroughs has been held to be not so obviously excessive as to warrant the courts in declaring the ordinance void.

The cases are collected in the opinion filed herewith in the case of New Hope *v.* W. U. Tel. Co.

Judgment affirmed.

Endorsement: 191 January term 1901. Borough of Taylor appellee *v.* Postal Telegraph Cable Company, appellant. Petition of Postal Telegraph Cable Co. for allowance of appeal from the superior court to the supreme court. May 1, 1901 Appeal allowed. Per Cur. Filed Apr. 22*1*, 1901 in supreme court.

39 (The opinion above referred to, New Hope *v.* W. U. Tel. Co is as follows:)

In the Superior Court of Pennsylvania.

BOROUGH OF NEW HOPE
v.
WESTERN UNION TELEGRAPH CO. } No. 101, Oct. Term, 1900. Appeal from Judgment of C. P. of Bucks County.

Per Curiam:

It has been decided first, that the adoption by a city of an ordinance imposing a reasonable annual license fee for each pole and each mile of suspended wire erected and maintained by telegraph, telephone and electric light companies within city limits is a valid exercise of police power; second, that boroughs have equal powers with cities in that regard; third, that such ordinance is not, as to telegraph companies engaged in the business of transmitting messages between the several States of the Union, in violation of the commerce clause of the Federal Constitution; fourth, that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense
40 fifth, that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities: W. U. Tel. Co. *v.* Philadelphia, 22 W. N. C. 39; s. c. 11 Cent. Rep., 102; Allentown *v.* W. U. Tel. Co., 148 Pa. 117; Chester *v.* P. R. & P. Tel. Co., 148 Pa. 120; Chester *v.* W. U. Tel. Co., 154 Pa. 466; Philadelphia *v.* Am. Union Tel. Co., 167 Pa. 406; Ridley Park *v.* Citizens' Electric Light & Power Co., 9 Pa. Superior Ct. 615; Lansdowne *v.* Same, 9 Pa. Superior Ct. 620; North Braddock *v.* Central, etc. Tel. Co., 11 Pa. Superior Ct. 24; Kittanning Electric Light Co. *v.* Kittanning, 11 Pa. Superior Ct. 31. See also McKeesport *v.* McKeesport, etc. R'y Co., 2 Pa. Superior Ct. 242, North Braddock *v.* Second Ave. Tr. Co., 8 Pa. Superior Ct. 233, Lansdowne *v.* Delaware etc., Electric R'y Co., 9 Pa. Superior Ct. 621, and Taylor *v.* C. P. Tel. etc. Co., 8 Pa. Dist. Rep. 92.

In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and main-
41 tenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led by the conclusion that the court would not have been justified by the precedents in declaring the ordinance void. The facts being undisputed,

we take it that the question of the validity of the ordinance was for the court to decide. But, if on the undisputed facts, the court would not have been warranted in declaring the ordinance void, the submission of the question of the reasonableness of the fee to the jury was an error of which the defendant has no just cause to complain.

Judgment affirmed.

42 *Record of the Court of Common Pleas of Lackawanna County.*

Exemplification.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Lackawanna, in the Commonwealth of Pennsylvania, to No. 447 March term, 1900, is contained the following:

Copy of Continuance Docket Entry.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE COMPANY.

J. M. Harris
F. R. Shattuck

Summons in assumpsit exit, 10 Feb'y 1900 ret'ble to next term. Summoned

Feb'y 19, 1900.—Filed plaintiff's statement.

M'ch 19, 1900.—Filed affidavit of defence

Same day.—By paper filed, F. R. Shattuck directed his appearance entered for defendant.

April 18, 1900.—Rule for judgment for want of a sufficient affidavit of defence.

April 25, 1900.—Rule for judgment is made absolute. By the court (arg't list)

43 May 2, 1900.—On præcipe of plaintiff's att'y judgment is entered in favor of the plaintiff and against the defendant in the sum of $220.50

June 16, 1900.—Defendant appeals to superior court.

Same day.—Filed bond with Chas. C. Adams and Geo. G. Glenn as sureties in the sum of $500.00

Same day.—Bond approved. By the court.

June 16, 1900.—Filed certiorari from superior court returnable second Monday of Jan'y 1901.

May 21, 1901.—Filed certiorari from supreme court returnable forthwith.

LACKAWANNA COUNTY, *ss:*

In Common Pleas.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE CO. } No. 447, Mar. Term, 1900.

John Copeland, proth'y:

Issue summons in assumpsit in above case. Ret'ble *sec. leg.*

JOHN M. HARRIS,
Att'y for Pl'ff.
J. COPELAND,
Prothonotary.

Filed Feb'y 10, 1900. Att'y p'd $2.00

44 *Summons.*

LACKAWANNA COUNTY, *ss:*

The Commonwealth of Pennsylvania to the sheriff of the said county, Greeting:

We command you that you summon the Postal Telegraph Cable Company so that they be and appear before our court of common pleas, to be holden at Scranton, in and for said county, on the 3rd Monday of March next, there to answer the Borough of Taylor in the plea of assumpsit and have you then and there this writ:

Witness the Hon. R. W. Archbald, president judge of the said court, at Scranton, on the 10th day of Feb'y, A. D. 1900.

[SEAL.] J. COPELAND,
Prothonotary.

Served this writ Feb. 12, 1900 and summoned The Postal Telegraph Cable Company defendant by giving to R. J. Little, manager of said Postal Telegraph Cable Company, defendant, a true and attested copy of within writ and made known to him the contents thereof.

So answers

C. E. PRYOR, *Sheriff.*
J. D. FERBER, *Deputy.*

45 Endorsement: No. 447 Mc'h term 1900. The Borough of Taylor *v.* The Postal Telegraph Cable Company Summons Returnable to March term 1900. Manager R. J. Little Feb'y 12, 1900 Sheriff 1.86 J. M. Harris, attorney for plaintiff.

Plaintiff's Statement.

In Court of Common Pleas of Lackawanna County.

BOROUGH OF TAYLOR
v.
POSTAL TELEGRAPH CABLE COMPANY. } No. 447, March Term, 1900.

Plaintiff's statement.

The plaintiff claims of the defendant the sum of two hundred twenty and fifty-one hundr*ethd* ($220.50) be- the sum of license fees and charges due to the plaintiff by the defendant, according to the following statement and specification, including interest from January 31, 1898, of each year hereinafter stated.

The borough of Taylor was duly incorporated in November, 1893, under the borough act of 1851 (P. L. 320), and the supplement thereto. On the tenth day of January, 1894, the proper
46 authorities of the borough passed "a comprehensive ordinance regulating its municipal affairs in many particulars, some provisions of which being as follows:"

"TITLE XV.

"*Poles and Wires.*

"SECTION 1. The high constable shall inspect all poles used to carry wires erected upon the thoroughfares or public grounds of the borough by any person or corporation, and the high constable aided by the police under his charge shall see that the said poles and wires are kept in a safe and good condition; and if the high constable or the police shall find any defects in the condition of the said poles or wires, he or they shall report the same to the burgess forthwith.

"SECTION 2. The burgess on receiving notice of any defect in the condition of the electric wires or poles within the limits of the borough, shall notify the owner or manager of the corporation or persons owning the said wires or poles to repair the same immediately and put them in a safe and trustworthy condition, and if the said owner or manager of the corporation or persons owning the said wires or poles fail to do so with the dispatch which the case requires, the burgess shall instruct the high constable to remove
47 the danger, if any exists, by reason of any defective wires or poles, and the cost of such shall be defrayed by the person or corporation owning such poles or wires.

"SECTION 3. Every telephone, telegraph, electric and electric railway company erecting or maintaining poles or wires within the borough limits, shall pay an annual license fee of one dollar for each pole and two and one-half dollars for each mile of wire so erected or maintained; said license fee to be paid on or about the first Monday in April in each year."

The said defendant prior to and since the incorporation of the borough of Taylor has maintained and used poles and wires within the corporate limits of the said borough, and for the purpose of this suit has maintained and used poles and wires within the corporate limit of the said borough as follows, to wit:

Poles.

In the year beginning January 31, 1898, and ending January 31, 1899, 91 poles at $1 per year per pole	$91.
In the year beginning January 31, 1899, ending January 31, 1900, 91 poles at $1 per year per pole	91.
	$181.

48 *Wires.*

In the year beginning January 31, 1898, and ending January 31, 1899, 42,200 feet of wire at $2.50 per mile per year	$19.75
In the year beginning January 31, 1899, and ending January 31, 1900, 42,200 feet of wire at $2.50 per mile per year	19.75
Total for wire	$39.50
Total for poles and wires	$220.50

With interest upon the several amounts due for license fees, for poles and wires, as follows, to wit:

Interest upon the sum due for poles from January 31, 1898, to January 31, 1899	91.00
Interest upon the sum due for wires from January 31, 1898, to January 31, 1899	19.75

By reason whereof the said defendant, by force of said ordinance is indebted to the plaintiff in the said sum of two hundred twenty and fifty-one-hundredths dollars ($220.50), with interest as aforesaid, the payment of which has been demanded of the defendant by the plaintiff, and refused, wherefore said plaintiff brings this suit.

JOHN M. HARRIS,
Attorney for Plaintiff.

49 February 16, 1900.

Certified from the records this 26th day of February, A. D. 1902.

[SEAL.] J. COPELAND, *Proth.*

Endorsement: No. 447 March T. 1900. Borough of Taylor *v.* Postal Telegraph Cable Company. Plaintiff's statement. Copy. Filed Feb'y 26, 1902. John M. Harris, att'y.

Affidavit of Defense.

BOROUGH OF TAYLOR *v.* THE POSTAL TELEGRAPH CABLE COMPANY.	C. P. of Lackawanna Co., March Term, 1900. No. 447.

PHILADELPHIA COUNTY, *ss*:

Charles C. Adams, being duly sworn according to law, says that he is the superintendent of The Postal Telegraph Cable Company, the above-named defendant, and that the said company has a full, just and true defense to the whole of the plaintiff's claim of the following nature:

Deponent is advised and therefore alleges that the statement of claim filed in the above case is defective and insufficient in law, and that it is not such a statement as requires it to file an affidavit of defense. Reserving, therefore, the right to take advantage at any time hereafter of the manifest insufficiencies in the said statement of claim, deponent further avers:

That the Postal Telegraph Cable Company, the above defendant, is a corporation duly organized and existing under the laws of the State of New York, and has paid to the Commonwealth of Pennsylvania all taxes charged by legislative enactment upon the value of its poles and wires erected and maintained in the said borough of Taylor and elsewhere in the State of Pennsylvania, the same being included in and represented by its capital stock and upon the gross receipts derived from the use of all of the said poles and wires; and further, that it has accepted the act of Congress approved July 24, 1866, and the amendments and supplements thereto, and that the poles and wires in question were constructed and have been at all times and are now operated thereunder and are principally employed and operated in the transmission of messages between the different States, and are therefore instruments of commerce among the several States; and for these reasons, the ordinance referred to in the plaintiff's statement is illegal and void.

That the said poles and wires were constructed and have been at all times and are now used for the transmission of telegraphic messages of the United States Government and the various departments thereof, at prices fixed from time to time by the Postmaster General of the United States, in accordance with the terms of the said act of Congress, approved July 24, 1866, and that the highways upon which said poles and wires are constructed and operated are post roads and post routes within the meaning of the said act of Congress, approved July 24, 1866, and the amendments and supplements thereto, and the acts of Congress defining post roads and post routes.

That the said poles and wires and telegraph lines are part of the inter-state telegraph system of the defendant, running into and through nearly every State of the United States, and connecting

with submarine cables from the United States to Europe and other foreign countries, and that messages transmitted over such telegraph lines maintained by the said poles and wires, in the said borough of Taylor, are in part, telegraphic messages between different States of the United States and between the United States and foreign countries, and said messages are one species of interstate and international commerce.

That the defendant never has and does not now maintain any office whatsoever in the said Borough of Taylor, plaintiff
52 herein, and defendant's said telegraph line, consisting of said poles and wires, merely runs through said borough of Taylor, and no telegraphic business of any kind whatsoever is done or transacted by said defendant in said borough of Taylor, except the maintenance of the said telegraph line and the transmission of telegraphic messages over the same.

That the said ordinance of the said borough of Taylor, mentioned in the plaintiff's statement, imposes a tax upon interstate business and is illegal and void as an unlawful interference with commerce among the several States and with foreign nations, and as depriving the defendant of its property without due process of law and as denying the defendant the equal protection of the laws and as a tax levied on a franchise granted by the United States of America and upon one of the instrumentalities employed by the Government thereof in the carrying on of the said Government.

Deponent further avers that the said Borough of Taylor neither on the tenth day of January, 1894, nor at any other time, had any right, power or authority vested in it to pass or enact an ordinance of the character and description referred to in the plaintiff's statement, and impose a license tax upon the defendant company, and that the said ordinance having been passed by the said plaintiff without authority of law, is therefore inoperative and void.
53 That the said ordinance of the plaintiff imposing a license fee upon the defendant of $1. for each pole and $2.50 for each mile of wire within said borough, is unreasonable, unjust and excessive, and is illegal and void in this, to wit, that the said ordinance is designed and intended to provide revenue by taxation for the general expenses of the said borough; that no other object than this exists, or has at any time existed, for such regulations as are imposed by the terms thereof; that the said borough is under no expense whatever of issuing the license required by the said ordinance, and has not been at any time before, during or after the period mentioned in the plaintiff's statement for which it makes its charge, under any expenses of any kind or nature whatsoever in inspecting and regulating the said poles and wires.

That the license fees imposed by the said ordinance are not based upon the cost and expense of said borough for inspection, supervision and regulation of defendant's lines and business, but said fees are imposed notwithstanding they are more than twenty times the amount that might have been or could possibly be incident to such inspection, supervision and regulation, together with all reasonable

measures and precautions that might have been or possibly could be required to be taken by the said borough for the safety of
54 its citizens and the public, or which might have be-n or possibly could be incurred as expenses for the most careful, thorough and efficient inspection and supervision that might have been made of the said poles and wires, and notwithstanding, as above set forth, the fact that the said plaintiff has not and does not maintain any inspection, supervision or care whatsoever over said poles and wires of the said defendant company, and has not incurred any expense whatever on account thereof. That the said plaintiff is not and was not during said period mentioned in the statement of claim filed in this case, under any additional or incidental liability of any kind or nature whatsoever in looking after the safety of such poles and wires and the maintenance thereof, and is not or was not under any additional or incidental liability for any injuries to persons or property which might have arisen or did arise during said period or could possibly arise by reason of the erection of the said poles and the stringing of the said wires within the limits of the said borough; that the said charges were made without any kind or character of expense or liability having been incurred by the said borough of Taylor. Under all of the circumstances above set forth, the assessing of such license tax or charge against defendant company is and was for the sole purpose of raising and producing revenue to said borough, wherefore said ordinance is illegal and void.

55 That the said borough is a sparcely populated district and the land therein of small value, and most of the land along the highway on which said telegragh line is constructed is not adapted for building purposes nor commercial use and said highway is little travelled. That said borough is a coal mining community and the buildings therein consist for the most part of coal miners' cabins or houses of one or two stories, and the business buildings are scattered and consist mostly of small shops or stores.

That the rental value of the land used by the defendant in the maintenance of its poles and wires in the said borough of Taylor is worth not exceeding 25 cents per annum for the ground occupied by each pole; that the said poles and wires thereon are located on the side of the highway at a point between the roadway and what is or could be used as a sidewalk, and said poles do not interfere in the slightest degree or to any extent with the use of the said highway for all highway purposes, nor with the use of the said sidewalk for all the usual purposes of a sidewalk and does not interfere in any way with any kind of traffic and said poles and wires have not, do not and cannot interfere in any way with the operation of men or apparatus in extinguishing fires; and the same is not an old decayed and worn out line, but, on the contrary, is compara-
56 tively new and sound, and there is no danger of accident from the decay or breaking down of the said poles and wires.

That the said license fees imposed by the said ordinance are not disproportionate to the value of the property upon which defendant's lines are located, nor to the obstruction to the highways caused

by said lines, nor to the interference with travel or business caused by the said lines within said borough; but, on the contrary, amount to twenty times as much as could be imposed under any power existing in said borough to make charges for such purposes, if such power existed, which defendant denies.

That the amount of said license fee is arbitrarily fixed by the Borough of Taylor without reference to any expense, inconvenience or detriment to said borough, either incurred or possible to be incurred, on account of the maintenance of the defendant's lines. That the amount of the said license fees, imposed upon the defendant by said ordinance, to wit, the sum of $110.25, largely exceeds the entire cost to the defendant itself of maintaining said line, including all repairs, reconstruction, cost of labor and materials and travelling expenses of employees and all expenses incurred by the defendant for a careful and efficient inspection and maintenance thereof.

That the said license fee imposed by the Borough of Taylor on this defendant, amounts to about $1.22 per pole per year,
57 which is in such amount in excess of the expenses of inspecting and supervising the said poles and wires and issuing a license and of indemnity against liability of any kind against said Borough of Taylor by reason of the injuries or otherwise. That the purpose of the said license tax or charge against defendant, as above set forth, is for the sole purpose of raising and producing revenue for said borough, and the amount thereof is manifestly unfair, unjust, excessive and unreasonable, and the same is void; and the said license tax, to recover which this suit is brought, is an attempt to tax the property of the defendant situated in said borough, and inasmuch as said defendant, as above set forth, has paid all of its corporation taxes in the State of Pennsylvania, its property in said borough is not subject to direct taxation, and for this reason also the said ordinance is illegal and void.

That the license fee imposed by said ordinance upon this defendant is prohibitive in that it exacts a charge so excessive as to destroy the defendant's business, the character, quality and management of the same being such that it is conducted upon the best, safest, most careful and most prudent principles.

That is the same license fees were exacted in all of the boroughs and municipalities covered by this defendant's telegraphic system in the State of Pennsylvania, the total amount would be a sum exceeding one hundred thousand dollars per annum.

58 That the said license fee is in the nature of a tax, and not of a license for reimbursement of expenses and other liabilities of the said borough in connection with said poles and wires, and the said ordinance is illegal and void, on account of the following facts to wit:

That the only large telegraph systems in the United States are those of the defendant and of the Western Union Telegraph Company, and that the said system of the Western Union Telegraph Company is constructed almost entirely upon the rights of way of the railroads throughout the United States, and said ordinance is

not applicable to the poles and wires of the said Western Union Telegraph Company, on railroads passing through said borough, but on the contrary, said ordinance applies only to poles and wires upon the thoroughfares or public grounds of the borough; the result being that the poles and wires of the said Western Union Telegraph Company are not affected by the said ordinance, while the poles and wires of the defendant, are affected by said ordinance and this condition of affairs applies not only to said borough, but to all the boroughs throughout the State of Pennsylvania, and in every State, with the result that if similar ordinances should be passed by all of the boroughs in said State of Pennsylvania and by municipalities in other States, it would be impossible for the defendant to continue to maintain and operate its line in competition with said Western
59 Union Telegraph Company, but, on the contrary, it would become insolvent by reason of the fact that the expenses and operation, including the said license fees, would be far in excess of the receipts of the defendant; the fact being that the defendant is obliged, in nearly every State of the Union, to construct its lines upon the highways, inasmuch as the said railroads are unwilling and refuse to allow the defendant to construct its telegraph lines on the said railroad right of way.

That the defendant's poles and wires were lawfully erected on said highways in said borough of Taylor, originally, in the year 1886 and long before the incorporation of the said Borough of Taylor, and said borough has no legal authority to require the defendant to obtain from it a license to maintain the same.

Deponent therefore avers that the said defendant company is in no way or manner liable to the said Borough of Taylor, and the sum of $220.50 is improperly charged; and that neither said amount, nor any other sum, is due by said defendant to it the said plaintiff.

CHARLES C. ADAMS.

Sworn and subscribed to before me this 17th day of March, 1900.

[SEAL.] EDWARD EVERITT,
Notary Public.

60 Endorsement: 447 Mar. T. 1900. Borough of Taylor *v.* The Postal Telegraph Cable Co. Affidavit of defense Filed Mar. 19, 1900.

Appearance for Defendant.

BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE COMPANY.
} C. P., Lackawanna Co., March Term, 1900. No. 447.

Enter my appearance for the defendant in above case.

F. R. SHATTUCK,
Att'y for Def't.

To proth'y.
March 17, 1900.

Endorsement: 447 Mar. T. 1900. C. P. Lackawanna county. Borough of Taylor *v.* The Postal Telegraph Cable Co. Appearance for def't. Filed M'ch 19, 1900. Shattuck.

61 In the Court of Common Pleas of Lackawanna County.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE CO. } No. 447, Mar. T., 1900.

To prothonotary:

Enter judgment in above stated case as per rule for judgment made absolute for want of a sufficient affidavit of defence for the sum of two hundred twenty and $\frac{59}{100}$ dollars and costs.

JOHN M. HARRIS,
Att'y for Pl'ff.

Endorsement: No. 447 M'ch 1900 The Borough of Taylor *v.* Postal Telegraph Cable Co. Filed May 2, 1900.

Common Pleas of Lackawanna County.

THE BOROUGH OF TAYLOR
v.
THE POSTAL TELEGRAPH CABLE COMPANY. } No. 447, March Term, 1900.

62 The plaintiff above-named excepts to the sufficiency of the affidavit of defense filed in the above case, as follows, to wit:

1st. The affidavit does not state any sufficient defense to the plaintiff's cause of action.

2nd. The above case comes up between the same parties and in the same court as the cases appearing at numbers 119 May term, 1895, and 639 January term, 1899, and entitled "The Borough of Taylor *v.* The Postal Telegraph Cable Company."

3rd. The parties are identical, the material facts are substantially the same, the principles of law involved are identical, the cause of action is the same, involving the same questions of fact and law.

4th. The exact points raised in this case have been passed upon in the cases just mentioned, and also in the case of The Borough of Taylor against The Central Pennsylvania Telephone and Supply Company, in common pleas of Lackawanna county, No. 680 January term, 1895, the case having been heard before Judge McPherson specially presiding under the provisions of the act of 1874, without a jury. After a careful consideration of the questions of law and fact raised in this case, he directed judgment to be entered in favor of the plaintiff. In his opinion he refers to the opinions of

63 Judge Albright and Archbald as having passed upon and decided the exact points raised by the defendant in the case of The Borough of Taylor *v.* The Central Pennsylvania Telephone and Supply Company just cited.

5th. The affidavit of defense filed in the case at bar bring the third case to come before this court, and the three cases being between the same parties, involving the same points of law, and based upon the same cause of action, raises the same questions of fact, brings before this court no point either of law or fact, that has not been judicially passed upon by this court in a careful, regular, deliberate and just manner, and the matters and things involved in the said case were prosecuted to final judgment by this court, and have become in all respects *res judicata.*

It would appear that the defendants in this case, in view of the facts just stated above, and in view of the further fact that when the case has come for final judgment in the appellant courts the defendant has invariably paid the amount of the judgment and thus avoided a decision by the superior court of Pennsylvania, making further litigation in this manner unwarranted and impossible. We would respectfully submit therefore that the cases are not defendant in good faith, and respectfully submit that a rule for judgment for want of a sufficient affidavit of defense ought to be granted.

JOHN M. HARRIS,
Attorney for Plaintiff.

64 Endorsement: Common pleas of Lack'a Co. No. 447 March term, 1900. The Borough of Taylor *v.* The Postal Telegraph Cable Co. Now March — 1900, upon filing the within petition and upon motion of John M. Harris, attorney for plaintiff, rule is granted upon the defendant to show cause why judgment should not be entered for want of a sufficient affidavit of defense. Returnable to next argument court. Filed April 18, 1900.

Appeal Bond.

BOROUGH OF TAYLOR *v.* THE POSTAL TELEGRAPH CABLE Co., Appellant. } C. P. of Lackawanna Co., March Term, 1900. No. 447.

The Postal Telegraph Cable Co. appellant having appealed from the judgment of the court of common pleas of the county of Lackawanna entered May 2, 1900 to the superior court, comes into court with Charles C. Adams and Geo. G. Glenn, its sureties and they acknowledge themselves bound and indebted to the Commonwealth of Pennsylvania, for the use of Borough of Taylor in the
65 sum of five hundred dollars to be levied of their property, real and personal, to be paid said obligee its certain attorneys or assigns.

Upon this condition, that if the said appellant shall prosecute the appeal with effect and abide the order or decree of the appellate court, and pay all costs and damages awarded by the appellant court, or legally chargeable against said appellant, and pay all damages for injuries suffered by appellees from the time of the

decree entered and all mesne profits accruing after judgment, then the above obligation to be void, or else to remain in full force and virtue.

POSTAL TELEGRAPH CABLE CO.,
By C. C. ADAMS, *Superintendent.*
(Stamp.) CHARLES C. ADAMS.
GEO. G. GLENN.

Sealed and delivered, the ninth day of June, A. D. 1900.
In presence of
EDWARD EVERITT.

June 16, 1900.—Bond approved
J. COPELAND, *Proth'y.*

66 *Writ of Certiorari.*

In the Superior Court of Pennsylvania.

THE SUPERIOR COURT OF PENNSYLVANIA, *Sitting at Scranton,* } *ss:*

The Commonwealth of Pennsylvania to the judges of the common pleas court for the county of Lackawanna, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of The Postal Telegraph Cable Co. from our decision in the case of Borough of Taylor *v.* The Postal Telegraph Cable Co. No. 447 M'ch term 1900, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the judges of our superior court of Pennsylvania, at a superior court to be holden at Scranton the second Monday of January next, so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that
67 which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, doctor of laws,
[SEAL.] president judge of our said superior court at Scranton the 9th day of June, in year of our Lord one thousand nine hundred.

SAM. H. STEVENS,
Prothonotary.

Endorsement: No. 24 January term 1901. Superior court. Certiorari to the com. pleas court county of Lackawanna. Returnable the second Monday of January, 1901. Rule on the appellee, to appear and plead on the return-day of the writ. Filed June 16, 1900. Pd. 3.00 Shattuck, att'y.

Writ of Certiorari.

In the Supreme Court of Pennsylvania.

EASTERN DISTRICT OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Lackawanna, Greeting:

68 We being willing for certain causes, to be certified of the matter of the appeal of Postal Telegraph Cable Company, from the judgment of the superior court No. 24, January term 1901 in affirming the judgment of the court of com-
[SEAL.] mon pleas of the county of Lackawanna No. 447 March term 1900 wherein Borough of Taylor was plaintiff and the said appellant was defendant, before you, or some of you depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, forthwith, so full and entire as in our court before you they remain, you certify and send together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable J. Brewster McCollum, chief justice of our said supreme court at Philadelphia, the twentieth day of May in the year of our Lord one thousand nine hundred and one.

CHAS. S. GREENE,
Prothonotary.

69 To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

H. M. EDWARDS, *P. J.*

Endorsement: In C. P. Lackawanna No. 447 March term 1900. In superior court No. 24 January term 1901. No. 191 January term 1901 supreme court. Borough of Taylor *v.* Postal Telegraph Cable Company, appellant. Certiorari to the court of common pleas for the county of Lackawanna. Returnable forthwith. Rule on the appellee, to appear and plead on the return-day of the writ. *In re* petition for an allowance of an appeal from the superior court. May 1, 1901 Appeal allowed, *per curiam.* In testimony whereof witness my hand and official seal this 20th day of May, A. D. 1901. Chas. S. Greene, prothonotary. (Seal) Filed Feb. 24, 1902. In supreme court. Filed May 21, 1901. 3.00 due. Frank R. Shattuck.

70 UNITED STATES OF AMERICA, } ss:
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record pages 1 to 69 inclusive is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending wherein The Postal Telegraph Cable Company was appellant, and The Borough of Taylor was appellee.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district at Philadelphia, the 9th day of July, 1902, and in the one hundred and twenty sixth year of the Independence of the United States.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

71 I, J. Brewster McCollum chief justice of the supreme court of Pennsylvania, do hereby certify, that Charles S. Greene was, at the time of signing the annexed attestation, and now is, prothonotary of the said supreme court of Pennsylvania, in and for the eastern district, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this ninth day of July one thousand nine hundred and two.

J. BREWSTER McCOLLUM.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do certify, that the Honorable J. Brewster McCollum by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, chief justice of the supreme court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania, in and for the eastern district, at Philadelphia, this ninth day of July one thousand nine hundred and two.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE.

72 In the Supreme Court of the United States of America.

BOROUGH OF TAYLOR
against
POSTAL TELEGRAPH-CABLE COMPANY, Appellant. } No. —, —— Term.

Assignments of Error.

1. The learned court erred in affirming the judgment of the superior court of Pennsylvania.

2. The learned court erred in not reversing the judgment of the superior court of Pennsylvania.

FRANK R. SHATTUCK,
Attorney for Defendant.

June 25, 1902.

[Endorsed:] No. — —— term. In the supreme court of the United States of America. Borough of Taylor against Postal Telegraph-Cable Company, appellant. Frank R. Shattuck, att'y for appellant.

Endorsed on cover: File No. 18,615. Pennsylvania supreme court. Term No. 93. The Postal Telegraph-Cable Company, plaintiff in error, *vs.* The Borough of Taylor. Filed July 22d, 1902.

In the Supreme Court of the United States.

Postal Telegraph-Cable Company, Plaintiff in Error,

against

Borough of Taylor, Defendant in Error.

October Term, 1903.

No. 93.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania. The action was commenced in the Court of Common Pleas of Lackawanna County, Pennsylvania, which entered judgment against the plaintiff in error for want of a sufficient affidavit of defense, and which judgment was in turn affirmed by the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania.

The Borough of Taylor enacted an ordinance requiring all telegraph companies maintaining poles and wires within the borough limits to pay an annual license fee of one dollar ($1) for each pole, and two and one-half dollars ($2.50) for each mile of wire so erected or maintained.

This action was to recover such license charge or tax, for the two years beginning January 31, 1898, and ending January 31, 1900, upon the poles and wires of the plaintiff

in error. An affidavit of defense was duly filed, in which it was set forth by the plaintiff in error that it was a corporation of the State of New York, and had paid to the Commonwealth of Pennsylvania all taxes upon the values of its poles and wires maintained in the Borough of Taylor; that it had accepted the Act of Congress of July 24, 1866; that the poles and wires were used for the transmission of telegraphic messages of the United States government; that the highways upon which the poles and wires were constructed and operated are post roads and post routes; that said poles and wires constitute a part of the interstate telegraph system of the plaintiff in error, running into and through nearly every State of the United States and connecting with submarine cables from the United States to Europe and other foreign countries, and that messages transmitted over said line were in part telegraphic messages between different States of the United States and between the United States and foreign countries; and that the said ordinance imposed a tax upon interstate business, and was illegal and void. The further defense was made that the said license fees were not based upon the cost or expense to the said borough for inspection, supervision and regulation of the said telegraph line, and that said fees were more than twenty times the cost of inspection, supervision and regulation, together with all measures and precautions that might or could be required to be taken by said borough for the safety of its citizens and the public, and that said borough was not under any additional or incidental liability of any kind or nature in looking after the safety of said poles and wires and the maintenance thereof. The further defense was made that the assessment of such license fees or taxes was for the sole purpose of raising and producing revenue to said borough, and that the amount of said fees largely exceeded the entire cost to the plaintiff in error itself of maintaining said line, including all repairs, reconstruction,

cost of materials and traveling expenses of employees, and all expenses incurred by the plaintiff in error for the careful and efficient inspection and maintenance thereof; that the said license fees were prohibitive, in that the charge exacted was so excessive as to destroy the business of the plaintiff in error, inasmuch as the amount of said charges upon all of its poles and wires in the State of Pennsylvania would require it to pay a sum in that State alone exceeding one hundred thousand dollars ($100,000) per annum.

The Court of Common Pleas of Lackawanna County entered judgment against the plaintiff in error for the full amount of the claim of said borough, upon a rule taken for judgment for want of a sufficient affidavit of defense; and from the judgment thus entered this appeal has been taken to this Court.

SPECIFICATIONS OF ERROR.

(1) The learned Supreme Court erred, in affirming the judgment of the Superior Court of Pennsylvania;

(2) The learned Supreme Court erred, in not reversing the judgment of the Superior Court of Pennsylvania.

ARGUMENT.

Since the record in this case was removed to this Court, there have been two decisions rendered, which cover the points undertaken to be here presented. It is only necessary, therefore, that it shall now be determined, whether or not, under the facts set forth in the affidavit of defense, filed by the plaintiff in error, the case should have been left to the determination of a jury, and the reasonableness of the

license fees charged by the Borough of Taylor, determined in that forum.

In the case of Western Union Telegraph Company vs. Borough of New Hope, 187 U. S. 419, this Court held, that

> "a borough had the right, in the exercise of its police powers, to impose a reasonable license fee upon telegraph poles and wires within its limits, and that an ordinance imposing such fee is to be taken as *prima facie* reasonable;" and also said, "this license fee was not a tax on the property of the company or on its transmission of messages or on its receipts from such transmission or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on."

The Borough of New Hope, the defendant in error in that case, is a borough in the State of Pennsylvania, and the Borough of Taylor, the defendant in error here, is a borough existing under the same laws, and consequently possessed of the same powers; and it is not necessary, therefore, to present any argument here as to its right to impose license fees of this character, provided the same are reasonable.

A jury trial was had in that case, and a verdict duly rendered after the submission of evidence upon the part of both parties interested. The decision did not, however, reach further than to hold that it was going much too far to ask this Court to hold the ordinance void, and in this connection said:

> "As the Supreme Court pointed out, the elements entering into the charge are various, and the Court of Common Pleas, the Superior Court and the Supreme Court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition."

It is respectfully submitted, however, that the facts set forth in this case bring it within the ruling of the case of the Atlantic & Pacific Telegraph Company *vs.* City of Philadelphia, 190 U. S. 817, which was decided June 1, 1903, and followed the decision of the case of the Western Union Telegraph Company *vs.* Borough of New Hope, *supra*, which was decided January 5, 1903. In this last case, although trial was had before a jury, the Court nevertheless instructed the jury to render a verdict in favor of the plaintiff, the city of Philadelphia, for the full amount of its claim; and the decision of this Court went entirely to the point that, under all the facts, this was error, and that the case should have been left to the determination of the jury, for its decision, as to whether or not the license fees were reasonable. In the course of this last decision the Court said:

> "What is reasonable in one municipality may be oppressive and unreasonable in another. In determining this question the Court will have to regard all the circumstances of the particular city or corporation, the objects sought to be obtained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town or in the country."

It is distinctly set forth in the affidavit filed herein that the sole purpose of assessing this license tax was to raise and produce revenue to said borough; also, that the said telegraph company never has, and does not now, maintain any office whatsoever, in the Borough of Taylor, and that its telegraph line merely runs through the said borough, and no telegraphic business of any kind is transacted therein. It was further set forth that the said borough is a sparsely populated district, and the land therein of small value, and the land on the highways, on which the telegraph line was constructed, is not adapted for building purposes,

nor commercial use, and the highway is little traveled; that said borough is a coal mining community, and the buildings therein consist for the most part of coal miners' cabins or houses, of one or two stories, and the business buildings are scattered, and consist mostly of small shops or stores.

It has been repeatedly held in the State of Pennsylvania that all of the averments contained in an affidavit of defense must be treated as established facts.

Smyth *et al. vs.* Miller, 174 Pa. 679.

Further commenting upon the facts as they appeared in the case of Atlantic & Pacific Telegraph Co. *vs.* City of Philadelphia, *supra*, this Court said:

> "The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of the jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the Court might be justified in directing a verdict. After a careful review of the evidence, we are constrained to believe that it was not such as to exclude any other conclusion than that directed by the Court. We do not hold that it was not sufficient to sustain a finding by the jury to that effect, but simply that there were matters presented from which a jury might rightfully conclude that the ordinance and license charges were unreasonable."

This Court then pointed out the questions of fact which in its opinion required the case to be presented for the jury's determination, as follows:

> (1) "The removal of charges on underground wires was as an inducement to have the wires placed underground, and the only requirement was that whoever did it should supply the city or furnish the city with one duct or chamber for the use of the city. There was no other charge con-

nected with it; it was to remove all license charges to have them place their wires under ground."

(2) "There was evidence of the expenses of the electrical bureau . . . but there was no testimony definitely disclosing how much of the labor of that bureau was in respect to telegraph wires and poles, and how much in respect to electric light wires and poles. . . . On the other hand, the company showed the extent of its own supervision and the cost of repair, maintenance and supervision. . . . There was also proof of the number of electric light lamps, poles and miles of wire within the city, and other kindred facts."

This Court expressed its views as to the result of a consideration of these facts in the following language:

"Now, the comparison of all this evidence, the determination of its weight and effect, and whether the charge made by the city for supervision was reasonable or not, should have been left to the jury. As there was testimony that the actual cost of maintenance, repair and supervision was, during the years in question, less than one-half that charged by the city for supervision alone, and as it appeared that at first the license fee per mile of overhead wire was two dollars and one-half and underground wire one dollar, and that within three years thereafter all charges in respect to underground wire were taken away, and, as the head of the Electrical Department declared, was taken away for the purpose of inducing the removal of overhead wires and placing them all underground, the jury might have found that the ordinance was unreasonable. It might have come to the conclusion that the charge was not made simply to meet the expenses of supervision, but rather to make a charge so burdensome as to compel the company to remove its wires from poles and put

> them in conduits. . . . We think, therefore, the Court erred in withdrawing the case from the jury."

In the present case the facts set up to meet the test above set forth, in the opinion of this Court, and which, accepted as true, are sufficient to require it to be held that the ordinance in question is unreasonable in its provisions, are as follows:

(1) The telegraph company has accepted the Act of Congress of July 24, 1866, and is engaged in interstate commerce.

(2) The pole line in question was erected in the Borough of Taylor in the year 1886, long before the incorporation of the said borough; and no business is transacted therein by the telegraph company.

(3) The ordinance is designed and intended to provide revenue, by taxation, for the general expenses of the borough, and no other object than this exists, or has any time existed, for such regulations as are imposed by the terms thereof.

(4) The borough is under no expense whatever of issuing a license, and has not been at any time before, during or after the period mentioned for which it makes its charge under any expense, of any kind or nature, in inspecting and regulating the poles and wires of the telegraph company.

(5) The license fees imposed by the ordinance are more than twenty times the amount that might have been or could possibly be incident to an inspection, supervision and regulation thereof, together with all reasonable measures and precautions that might have been or possibly could be required to be taken by the borough for the safety of its citizens and the public, or which might have been or possibly could be incurred as expenses for the most careful, thorough and efficient inspection and supervision that might have been

made of the poles and wires, notwithstanding the fact that the borough has not and does not maintain any inspection, supervision or care whatsoever over the poles and wires, and has incurred no expense whatever on account thereof.

(6) The borough was not, at any time, under any additional or incidental liability of any kind or nature in looking after the safety of the poles and wires and the maintenance thereof, or for any injuries to persons or property that might have arisen or did arise during the period for which the charges are made.

(7) The borough is a sparsely populated district and the land therein of small value, not adapted for building purposes or commercial use, and the highway on which the poles are erected is but little traveled.

(8) The rental value of the land used by the telegraph company in the borough is not worth more than twenty-five (25) cents per annum for the ground occupied by each pole.

(9) The poles and wires thereon are located on the side of the highway, at a point between the roadway and what is or could be used as a sidewalk; and they do not interfere, in the slightest degree, with the use of the highway for all highway purposes, nor with the use of the sidewalk for all the usual purposes of a sidewalk, and do not interfere in any way with any kind of traffic or with the operations of men or apparatus in extinguishing fires.

(10) The telegraph line is comparatively new and sound, not decayed or worn out; and there is no danger of accident from the decay or breaking down of the poles and wires.

(11) The license fees imposed are not proportionate to the value of the property upon which the line is located, nor to the obstruction to the highways caused by said line, nor to the interference with travel or business caused by the said line within the borough.

(12) The amount of the license fees is arbitrarily fixed by the borough without regard to any expense, inconvenience or detriment to the borough, either incurred or possible to be incurred, on account of the maintenance of the telegraph lines.

(13) The amount of the license fees annually imposed largely exceeds the entire cost to the telegraph company itself of maintaining the line, including all repairs, reconstruction, cost of labor and material and traveling expenses of employees and all expenses incurred by the telegraph company for a careful and efficient inspection and maintenance thereof.

(14) The imposition of these license fees is an attempt to tax the property of the telegraph company situated in the borough; and inasmuch as it has paid all of its corporation taxes in the State of Pennsylvania, its property in the borough is not subject to direct taxation.

(15) The license fees are prohibitive, because they exact a charge so excessive as to destroy the business of the telegraph company; and similar fees exacted in all of the boroughs and municipalities of the State of Pennsylvania from the telegraph company would require it to pay annually a sum amounting to over one hundred thousand dollars ($100,000).

(16) On account of the impossibility to successfully compete with the only other large telegraph system in the United States, the effect of the imposition of these license fees would result in the insolvency of this telegraph company, inasmuch as the effect would be to cause its expenditures to be largely in excess of its receipts.

All of the above facts are duly set forth in the affidavit of defense filed in this case (record, pages 23 to 27, inclusive), and it is only necessary to state them in order to reach the conclusion that if they were proved as facts by

testimony presented to a jury the latter would be entirely justified in rendering a verdict which in effect would be that, the charges imposed being unreasonable, the ordinance of the borough is void.

The imposition of license fees or taxes of a character such as is attempted in this case is a burden which the telegraph companies are being compelled to bear and suffer to a greater extent within the last few years than ever before. If some arbitrary figure is to be presumed under all circumstances to be reasonable, without regard to the special facts which may exist in every particular locality, the protection of the telegraph companies, which have accepted the Post Roads Act of July 24, 1866, and are transacting business not only between the different States, but between the United States and foreign countries, absolutely requires that this Court shall halt the practice, or the entire community of the United States must suffer by reason of being required to pay larger tolls for telegraphic messages.

FRANK R. SHATTUCK,
For Plaintiff in Error.

FILE COPY.

Office Supreme Court
FILED
NOV 10 1903
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 93.

The Postal Telegraph-Cable Company, Plaintiff

IN ERROR,

vs.

The Borough of Taylor.

Paper Book of Defendant in Error.

E. O. WAGENHORST and JOHN M. HARRIS,
Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 93.

THE POSTAL TELEGRAPH-CABLE COMPANY, Plaintiff IN ERROR,

vs.

THE BOROUGH OF TAYLOR.

BRIEF OF DEFENDANT IN ERROR.

Error in this case, on the part of the Supreme Court of Pennsylvania, is suggested by the appellant herein on two grounds.

First.—The decision of the Supreme Court of Pennsylvania offends Article 1, Section 8, clauses 3 and 7 of the Constitution of the United States.

Second.—The decision of the Supreme Court of Pennsylvania offends Article 16, Section 12 of the Constitution of the State of Pennsylvania, and, in connection therewith, the Act of April 29th, 1874, Section 33, P. L. 92, passed by the Legislature of Pennsylvania.

Upon the *first* ground the Appellant to this tribunal seeks a reversal, urging that by the enforcement of the decree of the Supreme Court of Pennsylvania, (1) Inter-

state Commerce will be interfered with beyond the power of the State of Pennsylvania so to interfere. (2) The Post Roads Act of the Congress of the United States of America of July 24, 1866, its supplements and amendments, will be infringed.

Upon the *second* ground the Appellant contends for reversal for the reason that Telegraph Companies in Pennsylvania are, by virtue of the Constitution of the State and the Act of 1874 passed by the State Legislature, exempt from the provisions of a Borough ordinance regulating the inspection of telegraph poles and wires by borough officials and the imposition by the Borough of license fees upon the same.

In the State of Pennsylvania the matter brought here for final adjudication is res adjudicata. A long line of decisions, covering a period of more than ten years, and rendered by distinguished jurists, with not a single wavering, from the lowest to the highest appellate court, to disturb the fixity of the proposition, establishes the law that a Borough in Pennsylvania may, by ordinance, impose upon Telegraph Companies a reasonable license fee for the poles and wires maintained by them in the limits of the borough, and that such an imposition is a legitimate exercise of the police power of the State delegated to Boroughs.

"The introduction and construction of telegraph, telephone, electric light, electric power and street car lines" says Willard, Judge, "through, over and upon city streets the erection of poles and stringing of wires thereon, charged with dangerous agencies as motive power, call for the exercise of more than ordinary care, not only in the erection of poles and proper adjustment of the wires, but in the maintenance and repair of the same and a vigilant and constant inspection, and every municipality owes the duty of rigid inspection to its citizens. In the performance of this duty the proper authorities of the city of McKeesport had a right to pass the ordinance above quoted, and

neglect on their part to have done so would have been neglect of public duty."

McKeesport vs. Railway Co. 2 Superior Court Rep. 242.

Millerstown vs. Bell, 123 Pa. 151.

Frankford Railway Company vs. Phila. 58 Pa. 119.

Taylor Borough vs. Postal Telegraph-Cable Company 16 Pa. Superior Court 345.

Johnson et al vs. Phila. 60 Pa. 445.

As to the reasonableness of the fee fixed by the ordinance in this case, to wit: One dollar per pole and two dollars and fifty cents per mile of wire per annum: the Courts of Pennsylvania, from the Common Pleas to the Supreme Court, have declared these fees to be a reasonable charge in consideration of all the elements which enter into the charge. These elements may be enumerated as follows, to wit: The probable expense for issuing a license; the probable expense for such inspection, regulation and police supervision as the municipal authorities may deem necessary to make in the rightful discharge of their duties in the premises. Another important element, arises from the probable liability of the municipality for injuries to persons and property, resulting from defective poles and wires.

It was averred in the affidavit of the defendant in the case of the Borough of Taylor against the Postal Telegraph-Cable Company, tried in the Court of Common Pleas of Lackawanna County, that the license fees charged were at least five times the amount of the expense involved in the supervision exercised by the Borough. The Supreme Court of Pennsylvania however in the case of Chester City vs. W. U. Telegraph Co., 154 Pa. 466, holds:

"For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is, it does not go far enough. It refers only to the usual, ordi-

nary or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

The case now appealed was not tried before a jury; judgment having been entered against the plaintiff in error, in the Court of Common Pleas of Lackawanna County, Pennsylvania, without the interposition of a jury, but for want of a sufficient affidavit of defense. The case of the Atlantic & Pacific Telegraph Company against Philadelphia, which was tried before a jury, and where it was held that "the question of reasonableness (of the license fee) should be submitted to the jury," does not therefore apply. 190 U. S. 160.

INTERSTATE COMMERCE.

The ordinance passed by the Borough of Taylor, the appellee herein, is not directed against interstate commerce. The provisions of the ordinance apply to domestic as well as foreign, to local and out-side owners and lessees of Telegraph lines. Under the regulations, police charges are imposed not upon the value or volume of business transacted in the Borough, nor upon the right to transact such a business there, nor for the privilege of engaging in interstate commerce. The ordinance is an ordinary police regulation designed to protect life and property; and imposing license fees upon the poles and wires of the

Appellant situated in the Borough, for the purpose of defraying in some manner the expense of inspecting the same, and not upon the Appellant's business, it is not a regulation of interstate commerce. A constant and well regulated inspection by borough officials of telegraph poles and wires is advantageous to the government and the general public.

The provisions of the ordinance do not obstruct commerce; they aid it.

Adams Express Company vs. Ohio, 165, U. S. 194.

Adams Express Company vs. Ohio, (refusing a new hearing) 166 U. S. 185.

Hennington vs. Georgia, 163 U. S. 299.

Pullman Palace Car Company vs. Commonwealth of Pennsylvania, 141 U. S. 613.

The ordinance of the Borough of Taylor is internal police legislation, neither prohibitive of, or restrictive upon, or directed against any particular commerce of the class over which it legislates.

The power to enact laws regulating the internal commerce of a State, and those which respect turn-pike roads, has never been surrendered to the general government.

Gibbons vs. Ogden, 9 Wheaton 203, 204, etc.

A license tax is not a regulation of commerce.

License Tax Cases, 5 Wallace 462.

Osborne vs. Mobile, 16 Wallace 479.

License Cases 5 How. 504.

The ordinance imposes upon the borough officials duties and obligations; a circumstance which frees the regulation from the imputation that it is a revenue measure.

It is the duty of every municipality to its citizens to inspect with greatest scrutiny the erection and maintenance of poles and wires upon the streets, and the burden of such scrutiny should be borne by those whose interest in the erection and maintenance of the poles and wires are the

greater. At any rate the police power of the state is paramount, and a license fee for police inspection is not a regulation of commerce.

It is not of record in this case that the Appellant Company, by reason of the enforcement of the provisions of the ordinance, was unduly hampered in transmitting interstate messages, nor does it appear that its commerce was destroyed. The Appellant Company does not deny, it is a fact admitted, that at many points within a radius of ten miles of Taylor Borough, it both receives and transmits messages to and from States.

A borough in Pennsylvania, in the exercise of its police power, has the right and power to require of the Appellant Company the erection of safe poles and wires, and it has the right to constantly inspect the poles and wires and to see that they are safe. It is more than a right, it is a duty of the Borough officials to protect the lives and property of the citizens. The collection of revenue is not the object of the ordinance. It is, therefore, a proper police regulation, under the ruling in New York, New Haven et al Railway Company, vs. New York, 165 U. S. 628.

POST ROADS ACT.

A telegraph company may not, relying on this act, occupy the streets of a municipality without compensation to the municipality.

St. Louis vs. W. U. Telegraph Company, 148 U. S. 92.

The license fees imposed upon the Appellant Company by the Borough of Taylor are not sufficiently large to deprive the said Appellant Company of power to serve the government as it was intended to serve it, nor does it hinder the efficient exercise of its power. There is nothing in the record in this case to show it, and it is contended here by the Appellee that, in this case, the Court below was the proper and the only Judge of what amounts to such

excessive and exhorbitant charges as to cripple the Appellant Company; the Court below being cognizant of the facts and circumstances in this case, and in similar cases as they may vary in various municipalities within its jurisdiction.

Telegraph Companies enjoying the privileges of the Act of July 24th, 1866, do so in subordination to the due exercise of the police power of the State in which their lines are situated.

Richmond vs. Bell Telephone & Telegraph Company, 174 U. S. 761.

The rights so given are permissive only, and properly subject to all state and local legislation regulating their exercise.

THE CONSTITUTION OF PENNSYLVANIA AND THE ACT OF 1874.

It is true that, under the constitution and laws of Pennsylvania, associations, corporations and individuals have the right to construct and maintain lines of telegraph within the State, but Art. XVI, Section 3, of the Constitution of Pennsylvania says, "The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State."

The Appellant Company owes an obedience to the laws of Pennsylvania, from yielding which an act of Congress cannot dispense it. The police power of the State is supreme over Congress. It existed in municipal corporations at common law. By the exercise of this police power, the legislature of Pennsylvania by an Act of Assembly, and the borough of Taylor by ordinance, protects the citizens of the borough against what may be declared negligence in the management and maintenance of the Appellant's poles and wires. It is subject to reasonable restraints and

burdens. "There is no arbiter in such case, beyond the State itself, to determine what legislation is just."

Potters Dwaris on Statutes and Constitutions. (Ed. 1871) P. 445-456.

The fourteenth amendment to the Federal Constitution did not take from the states the police power reserved to them at the time of the adoption of the Constitution.

Slaughter-house cases, 16 Wallace 36.

Mugler vs. Kansas 123 U. S. 623.

Cooley (Constitutional Limitations) P. 239.

The ordinance is not inharmonious, or hostile to citizens or corporations of New York State employed in business in the borough of Taylor, inasmuch as it imposes on citizens and corporations of Pennsylvania and of the borough itself the self-same conditions. The ordinance is uniform and operates alike on all, and is, therefore, a proper State regulation.

Western Union Telegraph Co. vs. Mass. 125 U. S. 530.

Leloup vs. Port Mobile, 127 U. S. 311.

CONCLUSION.

Every phase of the matter here presented has been passed upon and finally adjudicated in this Court, in the case of

St. Louis vs. W. U. Telegraph Co., 148 U. S. 92.

Reaffirmed in St. Louis W. U. Telegraph Co., 156 U. S. 211.

Reaffirmed in Western Union Telegraph Company vs. New Hope, 187 U. S. 419; and followed in Atlantic & Pacific Telegraph Company vs. Philadelphia, 190 U. S. 160.

It is therefore respectfully requested that the judgment of the Pennsylvania Courts be affirmed, and that the judgment of the Supreme Court of the United States be entered for the defendant in error herein.

E. O. WAGENHORST and JOHN M. HARRIS,

For Defendant in Error.

Supreme Court of the United States.

No. 93—October Term, 1903.

The Postal Telegraph-Cable Company, Plaintiff in Error, *vs.* The Borough of Taylor.	In error to the Supreme Court of the State of Pennsylvania.

[January 4, 1904.]

The plaintiff in error seeks to review the judgment of the Supreme Court of Pennsylvania, which affirmed the judgment of the Superior Court of that State, which in its turn affirmed the judgment of the Court of Common Pleas of Lackawanna County, in favor of the defendant in error in an action brought by it to recover the amount of a license fee imposed upon all telegraph, telephone and electric light companies having poles and wires in the borough. The ordinance was of the same nature as that mentioned in the immediately preceding case of *Postal Telegraph-Cable Company* v. *Borough of New Hope.*

By the plaintiff's statement of its claim against the defendant, the telegraph company, it sought to recover from the company the sum of $220.50, including interest from January 31, 1898.

The defendant is a corporation engaged in interstate commerce by transmitting telegraphic communications among the several States, and by its affidavit of defense it averred that it was a company engaged in forwarding telegraphic dispatches among the several States, and was a corporation organized under the laws of the State of New York; that it had paid the Commonwealth of Pennsylvania all taxes which had by legislative enactment been levied upon the value of its poles and wires erected and maintained in the borough of Taylor and elsewhere in the State; that it had accepted the act of Congress, (14 Stat. 221,) providing for the construction of telegraph lines over any post road of the United States; that it had never maintained, and does not now maintain, any office whatever in the borough of Taylor, and that no telegraphic business of any kind is done or transacted by the defendant in that borough, except the maintenance of the telegraphic lines and the transmission of telegraphic messages over the same from other places; that the ordinance in question is unreasonable, unjust and excessive, and is illegal and void, because it is designed and intended to provide revenue by taxation for the general expenses of the borough, and that no other object than this exists, or has at any time existed, for the regulations imposed by the ordinance; that

the borough is under no expense whatever in issuing the license required by the ordinance, and has not been at any time before, during or after the period mentioned in the plaintiff's statement for which it makes demand, under any expense or charge of any kind whatsoever in inspecting and regulating the poles and wires; that the license fees imposed by the ordinance are not based upon the cost and expense to the borough for inspection and supervision or regulation of the defendant's lines and business, but the fees are imposed notwithstanding they are more than twenty times the amount that might have been or could possibly be incidental to such inspection, supervision and regulation, together with all reasonable measures and precautions that might have been or possibly could be required to be taken by the said borough for the safety of its citizens and the public, or which might have been or possibly could be incurred as expenses for the most careful, thorough and efficient inspection and supervision that might have been made of the poles and wires of the defendant, although the plaintiff has not and does not maintain any inspection and supervision or care whatsoever over the poles and wires of the defendant, and has incurred no expense whatever on account thereof; that the borough is a sparsely populated district and the land therein of small value, and most of the land along the highway on which the telegraph lines are constructed is not adapted to building purposes nor commercial use, and the highway is little traveled; that the borough is a coal mining community and the buildings therein consist for the most part of the coal miners' cabins or houses of one or two stories, and the business buildings are scattered and consist mostly of small shops or stores; that the poles and wires thereon are located on the side of the highway and do not interfere in the slightest degree or to any extent with its use for all highway purposes, and does not interfere with any kind of traffic or with the operation of men or apparatus in extinguishing fires; that the line is not old, decayed or worn out, but, on the contrary, is comparatively new and sound, and there is no danger of accident from the decay or breaking down of the poles and wires; that the license fees imposed by the ordinance are twenty times more than could be imposed under any power existing in the borough to make charges for all legal purposes; that the amount of the license fees imposed under the ordinance for each year largely exceeds the entire cost to the defendant itself of maintaining said line, including all repairs, reconstruction, cost of labor and material and traveling expenses of the employes, and all expenses incurred by the defendant by a careful and efficient inspection and maintenance of such poles and wires; that the fees imposed by the ordinance are so excessive that if every borough in the State of Pennsylvania in which defendant has a telegraph system should pass similar ordinances the total amount collected would exceed $100,000 per annum, and if the same kind of an ordinance should be passed in the other States by

the municipalities in which the poles and lines of the company are placed it could not pay the amount, but would become insolvent by reason of the fact that the expenses of operation, including the license fees, would be far in excess of the receipts of the defendant.

To this affidavit of defense the plaintiff excepted on the ground that it did not state any sufficient defense to plaintiff's cause of action, and also on the ground of *res judicata*, in that the same questions had been theretofore decided between the same parties in the courts of the State.

A rule for judgment was taken by the plaintiff for want of a sufficient affidavit of defense, and upon hearing the rule was made absolute, (the facts set forth in the affidavit of defense being thereby assumed,) and judgment for the plaintiff being entered, it was affirmed by the Superior and Supreme Courts of Pennsylvania.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

The grounds of our jurisdiction to review the judgment in this and the preceding case are similar to those which sustained it in the two cases of *Telegraph Company* v. *New Hope*, (187 U. S. 419,) and *Telegraph Company* v. *Philadelphia*, (90 Id. 160.) By reference to the opinions delivered in the State courts in this case it is apparent that it was not decided upon any question of *res judicata*, as set forth in the plaintiff's exceptions to defendant's affidavit of defense.

In the opinion of the Superior Court of Pennsylvania it was stated:

"Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the court, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same. Such a decision becomes a precedent which is to be regarded in other cases similarly situated. Were it to be held otherwise, the law upon the subject would be in hopeless confusion and uncertainty. We make these remarks because we cannot escape the conclusion that some of the averments of the affidavit of defense are, in reality, but the opinion of the defendant, undoubtedly honestly entertained, as to these matters. They are not stronger than the averments in *Philadelphia* v. *American Union Telegraph Company*, (167 Pa. 406,) and the other facts averred do not distinguish the case from others in which a similar fee in boroughs has been held to be not so obviously excessive as to warrant the courts in declaring the ordinance void. The cases are collected in the opinion filed herewith in the case of *New Hope* v. *Western Union Telegraph Company*."

The opinion referred to by the Superior Court is also contained in the record, and cases were cited in that opinion from the State courts holding that they would not declare an ordinance void because of the alleged

unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities. The court further remarked:

"In many of the foregoing cases the license fee was the same as that imposed by the ordinance under consideration. In none of the cases was the ordinance declared void for unreasonableness, although it was inferentially conceded that a case might arise where the license fee would be so grossly disproportioned to the burden imposed upon the municipality in consequence of the erection and maintenance of the poles and wires as to warrant the court in presuming that the ordinance was a revenue measure, not a police regulation. None of the cases lays down a fixed and invariable rule by which that question is to be determined, but after a comparison of the facts developed on the trial of this case, with the facts of some of the cases above cited, we have been led to the conclusion that the court would not have been justified by the precedents in declaring the ordinance void."

Upon the averments in the affidavit of defense, which in this proceeding must be taken to be true, we can come to no other conclusion than that the ordinance was void because of the unreasonable amount of the license fee provided for therein.

It was urged on the argument that this ordinance was a proper police regulation, and that the collection of revenue was not its object; that it was the duty of the borough officials to protect the lives and property of its citizens, and that in the discharge of such duty it had the right to constantly inspect the poles and wires for the purpose of seeing that they were safe.

There is no doubt that, for the purpose mentioned, the borough had the right claimed by its counsel. The averments of the affidavit of defense, however, show that no such duty has been discharged or attempted to be discharged by the borough. It has done absolutely nothing to protect the lives or property of its citizens by inspecting the poles and wires of the defendant.

In *Atlantic &c. Telegraph Co.* v. *Philadelphia*, (190 U. S. 160,) it was held that the testimony in a case like this might be such as to compel a decision one way or the other, and the court might then be justified in directing a verdict. We think this is one of those cases. We assume that a tax of this kind ought to be large enough to cover all expenses of police supervision of the property and instrumentalities used by the company in the borough, and that it is not bound to furnish such supervision for nothing, but may, in addition to ordinary property taxation, subject the corporation to a charge for the expenses of the supervision. The borough is also not compelled to make its expenditures for these purposes in advance of demanding the tax from the defendant, but it must be remembered that such a tax is authorized only in support of police supervision, and if it were possible to prove in advance the exact cost that

sum would be the limit of the law. As in the nature of things this is ordinarily impossible, the municipality is at liberty to make the charge enough to cover any reasonably anticipated expenses, and the payment of the fee cannot be avoided because it may subsequently appear that it was somewhat in excess of the actual expense of the supervision, nor can the company then recover the difference between the amount of the license fee and such cost. These observations are substantially reproduced from the opinion of the court in *Atlantic &c. Telegraph Company* v. *Philadelphia*, (*supra*,) delivered by Mr. Justice Brewer.

We come then to an examination of the question whether this fee, in the light of the admitted facts set forth in the affidavit of defense, can, by the widest stretch of imagination, be regarded as reasonable. The borough is, where the poles are planted and the wires stretched, sparsely settled, and the danger to be apprehended from neglect in regard to the poles and wires is reduced to a minimum. The borough has in fact done nothing in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any expenses arising from inspection or supervision on its behalf. The fee itself is twenty times the amount of expense that might have been reasonably and fairly incurred to make the most careful, thorough and efficient inspection and supervision that might have been made of such poles and wires, and for all reasonable measures and precautions that possibly could be required to be taken by the borough for the safety of its citizens and the public. This is not a mere expression of opinion. It is the averment of a fact. The company knows the amount it costs for the inspection, which it avers is made by its own servants, and which it avers is a most careful and efficient inspection, one intended to place and maintain the poles and wires in a perfectly safe and satisfactory condition. Knowing that cost and comparing it with the amount demanded under the ordinance, it is enabled to state as a fact, and not as a mere opinion, that the amount of the license fee exacted under the ordinance is as stated, twenty times more than it ought to be to secure a reasonable, efficient and most careful inspection, as set forth in the affidavit mentioned.

In *Chester City* v. *Telegraph Company*, (154 Pa. St. 464,) cited in *Telegraph Company* v. *New Hope*, (187 U. S. 419, 425,) it was said that the affidavit in that case averred that the rates charged were at least five times the amount of the expenses involved in the supervision exercised by the municipality. The Supreme Court held that while that averment must be admitted to be true, it did not go far enough, because it referred only to the usual, ordinary and necessary expenses of the municipal officers in issuing the license and other expenses thereby imposed upon the municipality, and that it made no reference to the liability imposed upon the city by the erection of the telegraph poles. It was also stated by the court that it is the duty of the

city to see that the poles are safe and properly maintained, and should a citizen be injured in person or property by reason of the neglect of such duty an action might lie against the city for the consequences of such neglect. The court said it was a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city in a particular year to the particular purposes specified in the affidavit.

The affidavit in this case goes much further. It includes not only the expenses that might have been incurred for an ordinary inspection, supervision and regulation, but takes into account the very matters that are spoken of in the extract from the opinion of the Supreme Court of Pennsylvania, (*supra.*) Instead of the averment that the license fee charged was at least five times the amount of the expense involved in the supervision exercised by the municipality, it is stated that it is more than twenty times the amount that would reasonably be expended for the purposes stated in the affidavit.

The liability to pay for injuries that might arise from the bad condition of the poles and wires, arising from the neglect of the company to inspect and supervise the same, is not a liability which the municipality is entitled to recover from the company in advance of its happening, but it is simply one of the reasons for an inspection by the borough, which shall be most carefully and continuously performed, in order that injuries may not arise from the neglect of such supervision.

When we come to an examination of the grounds upon which this kind of a tax is justifiable, and when we find that in this case each one of those grounds is absent, how is it possible to uphold the validity of such an ordinance? To uphold it in such a case as this is to say that it may be passed for one purpose and used for another; passed as a police inspection measure and used for the purpose of raising revenue; that the enactment as a police measure may be used as a mere subterfuge for the purpose of raising revenue, and yet because it is said to be an inspection measure the court must take it as such and hold it valid, although resulting in a rate of taxation, which, if carried out throughout the country, would bankrupt the company were it added to the other taxes properly assessed for revenue and paid by the company. It is thus to be declared legal upon a basis and for a reason that do not exist in fact.

We think the court is not bound to acknowledge an ordinance such as this to be valid in face of the facts stated in the affidavit of defense. Confessedly there has been here no inspection, no expense incurred to provide for one even though not made, and all expenses and liabilities that might fairly and reasonably be incurred on the part of the borough are not one-twentieth of the amount it exacts for an inspection which it has not made. Under such facts it would seem to be plain that the ordinance was adopted

as a means for the raising of revenue and not to repay expenses for inspection.

Judging the intention of the borough by its action it did not intend to expend anything for an inspection of the poles and wires, and did intend to raise revenue under the ordinance. Courts are not to be deceived by the mere phraseology in which the ordinance is couched when the action of the borough in the light of the facts set forth in the affidavit, shows conclusively that it was not passed to repay the expenses or provide for the liabilities incurred in the way of inspection or for proper supervision.

We are of opinion that, upon the averments contained in the defendant's statement of defense, the defendant was entitled to judgment. The judgment of the Supreme Court of Pennsylvania is, therefore, reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice HARLAN and Mr. Justice BREWER dissented.

True copy.

Test:

Clerk Supreme Court, U. S.